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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 540

CHARLES SCHILLER,

Petitioner,

v.

CHARLES LEFKOWITZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

RESPONDENT'S BRIEF IN OPPOSITION

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October 11, 1966.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent prays that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals of Maryland decided on May 11, 1966 be denied.

QUESTIONS PRESENTED

1. Should this Court grant a further review where the Petitioner has waived the fundamental constitutional right he now asserts.

2. Should this Court grant certiorari where the Court of Appeals of Maryland afforded a proper and complete appellate review on independent and adequate state

grounds notwithstanding the co-presence of federal grounds.

3. Should this Court grant certiorari where at most it could render an advisory opinion or pass on a moot question.

4. Should this Court grant certiorari where a state court has decided in a civil case on the retroactive application of a legal principle enunciated in a decision of first impression.

STATUTES INVOLVED

Article 36, Constitution of Maryland, Declaration of Rights.

> "That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

Rule 501(a), Maryland Rules of Procedure:

> "*To Further Convenience or Avoid Prejudice.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, counter-

claim, cross-claim, or third-party claim, or of any separate issue, or any number of claims, counterclaims, cross-claims, third-party claims or issues."

Rule 543(c), Maryland Rules of Procedure:

"*Challenge — To Array or Poll.* This Rule shall not affect the right of any person to challenge for cause, in the manner allowed by the law, the array or polls of any jury panel."

Rule 545, Maryland Rules of Procedure:

"*Trial by Jury — Effect of Election.*

"When trial by jury has been elected by any party, the action, including all claims whether asserted by way of counterclaim, cross-claim, or third-party claim, as to all parties and as to all issues triable of right by a jury, shall be designated upon the docket as a jury action and so tried."

Rule 885, Maryland Rules of Procedure:

"*Scope of Review — Limited to Questions Decided by Lower Court.* This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court."

STATEMENT OF FACTS

Growing out of a collision between two automobiles in Montgomery County, Maryland, on December 29, 1962, the Petitioner, as plaintiff, hereinafter referred to as Petitioner, on October 28, 1963, filed a Declaration in the Circuit Court for Montgomery County, State of Maryland, claiming damages as the result of a collision. The Respondent herein was named as defendant and will hereinafter be designated as Respondent. In filing the Declaration the Petitioner affirmatively elected to trial by jury. On November 13, 1963, the Respondent, through his attorney, joined issue by filing a general issue plea.

On November 2, 1964 the cause of action came on for trial with Judge Kathryn J. Shook presiding. The jury was duly sworn to try the issues.

The attorney then representing the Petitioner and the attorney then and now representing the Respondent, before making their opening statements, were invited by the Presiding Judge to approach the bench for a conference outside the hearing of the jury. At this bench conference it was suggested by the judge that the case should proceed on issues; first as to liability, and if the issue of liability were decided by the jury in favor of the Petitioner then as to damages. Counsel for the Petitioner and the Respondent both agreed and consented to this procedure. Whereupon, the judge charged the jury as follows:

> "Now, ladies and gentlemen of the jury, before I ask counsel to give their opening statements I will say to you that this case will be tried on the issues, the first being the issue of liability. There will be no testimony given to you concerning damages until you have determined whether there is liability or there is not liability.
>
> "So, gentlemen, you may address the jury."

After a complete trial on the issue of liability under the instructions of the Court, the jury returned a verdict for the defendant.

On November 5, 1964, the Petitioner, through his attorney, filed a motion for new trial. This motion came on for oral argument on February 5, 1965. The motion was denied and judgment was thereupon entered in favor of the Respondent for costs.

On February 24, 1965, the attorney who had represented the Petitioner in the aforesaid proceedings withdrew his appearance. The attorneys now representing the Petitioner then entered their appearance. On the same date, through these attorneys, the Petitioner noted an appeal to the Court of Appeals of Maryland. The sole question presented was:

> "Was the trial Court's bifurcation of the issue of liability from the issue of damages, in a civil trial by a jury of an automobile negligence case, justified by the *Maryland Rules of Procedure* and consistent with the Maryland Constitution?"

Under the rules of the Court of Appeals of Maryland the Respondent, through his attorney, filed a reply brief, stating:

> "The trial of this case on separate issues, first as to the issue of liability and later, if the plaintiff received a verdict as to the issue of damages, with the full approval of the Court and all parties, was proper and conclusive.
>
> "The question raised by this appeal was never raised and passed upon by the Lower Court and a review of the question on this appeal is precluded."

While this appeal was pending subject to oral argument, the Maryland Court of Appeals on October 11, 1965, filed

its opinion in *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475. In its opinion the Court of Appeals of Maryland stated (pg. 482):

> "Under the decision of the Supreme Court in Torcaso, we are constrained to hold that the provisions of the Maryland Constitution requiring demonstration of belief in God as a qualification for service as a grand or petit juror are in violation of the Fourteenth Amendment, and that any requirement of an oath as to such belief, or inquiry of prospective jurors, oral or written, as to whether they believe in a Supreme Being, is unconstitutional. * * *
>
> "We believe that the proper administration of justice requires, and we accordingly hold, that the legal principle enunciated in this case shall not apply retroactively, except for convictions which have not become final before rendition of this opinion."

The Petitioner then asked leave of the Court of Appeals of Maryland to amend his original brief to include relief by virtue of *Schowgurow*. In the amended brief the question presented was:

> "Was the Appellant deprived of rights guaranteed to him by the 14th Amendment of the Federal Constitution or the Maryland Declaration of Rights, when his civil cause of action was heard and decided by a jury whose members were required as a condition of their service to swear to a belief in God."

The appeal and amended appeal then came on for oral argument. On May 11, 1966 the Maryland Court of Appeals filed its opinion, which is designated as Petitioner's Appendix A (1-12).

REASONS TO DENY THE WRIT

Respondent urges that this writ be denied for the following reasons:

1. This Court should not grant certiorari where the Petitioner has not only waived the fundamental constitutional right he now asserts but has failed to assert affirmatively violation of any constitutional right.

2. The Petitioner was afforded a proper and complete appellate review by the Court of Appeals of Maryland on independent and adequate state grounds notwithstanding the co-presence of a suggested federal ground and for this reason certiorari should not be granted.

3. Certiorari should not be granted for the reason that if granted this Court could do nothing more than render an advisory opinion or pass on a moot question.

4. Certiorari should be denied where a state court has decided in a civil case on the retroactive application of a legal principle enunciated in a decision in a criminal case of first impression.

1. This Court Should Not Grant Certiorari Where the Petitioner Has Not Only Waived the Fundamental Constitutional Right He Now Asserts But Has Failed To Assert Affirmatively Violation Of Any Constitutional Right.

In *Johnson v. Zerbst*, 304 U.S. 458 (1938), at page 464, this Court defined a waiver as "an intentional relinquishment or abandonment of a known right or privilege." The Petitioner selected the forum in which he desired to litigate his cause of action. The Respondent had no alternative except to defend in the forum selected by the Petitioner.

A jury trial was affirmatively elected by the Petitioner in conformity with Rule 545 of the Maryland Rules of Procedure. He did not then raise any question respecting any violation of the Maryland Bill of Rights. He was duly represented by an attorney of his selection. At no time in this entire proceeding has the Petitioner suggested incompetency of his attorney nor has he made any suggestion that he was not aware of the actions of his attorney to further his cause of action in the state court. No claim is made that any member of the jury was not competent and qualified to serve or was in any respect an improper person. In conformity with standards then existing the jurors were validly selected. The Petitioner would now have this Court believe that he is entitled to relief by virtue of the findings of the Court of Appeals of Maryland in *Schowgurow*. But it is not even suggested that either he or the Respondent were of a religious class which in itself would bring them within the finding of the court in *Schowgurow*. In addition, there is no statement or even suggestion by the Petitioner that he was prejudiced in any way by the selection of the jury which returned a verdict adversely to him and in favor of the Respondent. The sum total of his request for certiorari is that the Maryland Court of Appeals having held unconstitutional the indictment of a member of the Buddhist faith, charged with a criminal offense, should automatically include the Petitioner without any showing whatsoever that he would come within the class suggested in *Schowgurow*. The defendant in *Schowgurow* asserted his claim for relief not only to the indictment but to the jury itself.

Under Rule 543(c) of the Maryland Rules of Procedure the Petitioner could have polled the jury. The Petitioner did not inquire of any juror on voir dire whether he or she was a believer or a nonbeliever. There is no proof

whatsoever that the constitutional rights of the Petitioner were ever violated. If there might be a violation, he remained silent at all times, including the question which he presented originally in his appeal based on a violation of the Maryland Constitution but giving no Article or Section which would support the violation.

> "No procedural principle is more familiar to this court than that a constitutional right can be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834, at 677.

In this instance the proper tribunal would have been the Circuit Court for Montgomery County, Maryland.

In the State of Maryland even in a criminal case a constitutional question can be waived. *Smith v. State*, 240 Md. at 480, and cases therein cited.

2. The Petitioner Was Afforded A Proper and Complete Appellate Review by the Court of Appeals of Maryland on Independent and Adequate State Grounds Notwithstanding the Co-Presence of A Suggested Federal Ground and For This Reason Certiorari Should Not Be Granted.

The Petitioner having consented to the application of Rule 501(a), Maryland Rules of Procedure, it would be obvious that he would not be entitled to relief by the Court of Appeals of Maryland in the event of an adverse verdict by the jury. This was recognized by the Petitioner because at no time has he attempted to raise a question on this point alone. The Maryland Court of Appeals would have no alternative except to sustain the verdict and judgment entered in the Circuit Court. It would, therefore, be necessary to attempt to secure appellate relief on some ground

not related to the rules which prevented appellate relief under the statutes of Maryland. To overcome this the Petitioner's original first thrust was directed to the Court of Appeals on the theory that there had been a general violation of his rights under the State Constitution. This would have been the posture of the case on appeal had the Court of Appeals of Maryland not filed its decision in *Schowgurow* while the Petitioner's appeal was pending. The Petitioner then amended his appeal to assert a violation under Article Fourteen of the Constitution of the United States. It is submitted that on the independent and adequate state grounds alone the Maryland Court of Appeals could afford a complete and proper review without regard to federal grounds which had come into the appeal by reason of an amendment to the original appeal by Petitioner. If there could be complete and adequate state grounds to justify the opinion of the Court of Appeals of Maryland, this Court would be required to deny the petition for writ of certiorari. As stated in *Herb v. Pitcairn,* 324 U.S. 117, 65 S. Ct. 459:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." Citing cases.

In the landmark case of *Fay v. Noia,* 372 U.S. 391, 83 S. Ct. 822, this Court was careful to define its limitations to interfere with the jurisdiction of a state court (pg. 843):

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds."

3. Should This Court Grant Certiorari Where At Most It Could Render An Advisory Opinion or Pass On A Moot Question.

Without the constitutional question which was injected into the appeal to the Court of Appeals of Maryland, there could be no possible relief to the Petitioner by this Court inasmuch as it would be a decision based on state law not subject to review. Inasmuch, however, as the Petitioner in his amended appeal asserted an alleged violation of Article Fourteen of the Constitution of the United States, it became incumbent upon the court to pass on the question. In doing so, however, the court held that the Petitioner was not entitled to relief because of failure to comply with Rule 501(a), Maryland Rules of Procedure. Therefore, this Court would be precluded from reviewing the judgment of the Court of Appeals of Maryland in this respect. The precise constitutional question raised was whether this Petitioner would be entitled to reversal on the theory that by reason of the opinion in *Schowgurow* there would be retroactive application in the Petitioner's civil action. The Court of Appeals of Maryland decided that there would be no retroactive application. Should certiorari be granted in this case this Court could do nothing more than render an advisory opinion as to this phase of the appeal without the power to require the Court of Appeals of Maryland to change its opinion inasmuch as the opinion was based on independent and adequate state law. See *Herb v. Pitcairn, supra*, and *Fay v. Noia, supra.*

4. Certiorari Should Be Denied Where A State Court Has Decided In A Civil Case on the Retroactive Application of A Legal Principle Enunciated in a Criminal Case of First Impression.

The Court of Appeals of Maryland realizing that *Schowgurow* would be a landmark decision, anticipated its application retroactively by stating (p. 482):

> "We believe that the proper administration of justice requires, and we accordingly hold, that the legal principle enunciated in this case shall not apply retroactively, except for convictions which have not become final before rendition of this opinion."

It would be reasonable to assume that the court would desire to confine its retroactive application to criminal cases without mention of civil cases. It must be conceded, however, that prospectively the ruling would apply to both criminal and civil cases. The application of the Petitioner to amend his appeal presented the court with an opportunity to rule on the retroactivity of *Schowgurow* as applied to civil cases. With the civil appeal pending, a decision would preclude direct appeals from the different circuit courts of the state.

This Court was confronted with a somewhat analogous situation when it decided *Johnson v. State of New Jersey*, 86 S. Ct. 1772 (1966). Prior to *Johnson*, this Court had filed two landmark decisions, *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), and *Miranda v. State of Arizona*, 383 U.S. ....., 86 S. Ct. 1602, 16 L. Ed. 2d ..... The question in the *Johnson* case was the retroactivity of each of these decisions. It was held (p. 1775):

> "We hold that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies

> only to cases in which the trial began after the date of our decision one week ago. The convictions assailed here were obtained at trials completed long before *Escobedo* and *Miranda* were rendered, and the rulings in those cases are therefore inapplicable to the present proceedings."

The Petitioner is now requesting this Court to grant his petition for writ of certiorari asking the Court of Appeals of Maryland to certify its record for review to determine the correctness of its application of retroactivity to a case decided by it. It is submitted that just as this Court established guidelines for the application of *Escobedo* and *Miranda*, the Court of Appeals of Maryland could establish guidelines for the retroactive application of *Schowgurow* not only in criminal cases but in civil cases.

In *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, this Court stated (p. 148):

> "* * * This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal.
>
> "We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."

This principle was restated in *Linkletter v. Walker*, 85 S. Ct. 1731 (1965), 381 U.S. 618.

CONCLUSION

Growing out of a collision between two automobiles, the Petitioner filed suit and elected that the issues be tried by a jury. He had his day in court. The jury found adversely to his interest. This is a result which either a plaintiff or

a defendant can expect in any civil suit. It is only natural that the party receiving an adverse verdict would desire a new trial. This has been refused to the Petitioner by the court in which the case was tried by a jury elected by the Petitioner. This judgment has been affirmed by the Court of Appeals of Maryland on state grounds. The Court of Appeals of Maryland also refused retroactive relief. This Court is being asked to grant the retroactive relief which at most would be a new trial on the novel stand that the Constitution of the United States is infringed. It is respectfully submitted that this case is not an appropriate case for the exercise of this Court's discretionary jurisdiction and that this petition for writ of certiorari should be denied.

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